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(7)

No. 09-654

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IN THE

Supreme Court of the United States

ORTHO BIOTECH PRODUCTS, L.P.,

Petitioner,

v.

UNITED STATES EX REL.
CHINYELU DUXBURY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether a federal court lacks subject-matter jurisdiction over a *qui tam* suit under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729 *et seq.*, that repeats publicly disclosed allegations from prior litigation, where the FCA relator did not provide the government with information on the suit's allegations before the public disclosure.

2. Whether an FCA relator, alleging that the defendant induced a third party to submit false or fraudulent claims, can satisfy Rule 9(b) of the Federal Rules of Civil Procedure without identifying a single false or fraudulent claim, but merely by alleging facts sufficient "to strengthen the inference of fraud beyond possibility."

RULE 29.6 DISCLOSURE STATEMENT

The Petitioner, Ortho Biotech Products, L.P. ("OBP"), is a New Jersey corporation and subsidiary of parent corporation Johnson & Johnson, also a New Jersey corporation. No publicly held corporation other than Johnson & Johnson owns 10% or more of OBP's stock.

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SUPPLEMENTAL BRIEF FOR PETITIONER

As its *amicus* brief makes clear, the United States supports the petition in significant respects. The United States agrees that each of the two questions presented concerns a ruling that "deepens an existing conflict" among federal circuits. Br. for the United States as *Amicus Curiae*, No. 09-654, at 9 (May 2010) ("U.S. *Amicus* Br."). It also agrees that the first question has "some continuing practical significance" and could have warranted review in an appropriate case, *id.* at 13, and that this Court's review of the second question "likely would be warranted in an appropriate case," *id.* at 9.

The United States ultimately recommends that the petition should be denied only because of the new healthcare law (the "PPACA").[1] The PPACA, among other things, amended the "original source" provision of the False Claims Act ("FCA"). In the United States' view, that amendment makes the first, "original source" question "not of sufficient continuing importance to warrant . . . review." U.S. *Amicus* Br. at 9. The United States further contends that the change to the "original source" provision renders this case an "[un]suitable vehicle" for resolving the "unsettled and significant" Rule 9(b) question because "the Court could not address the Rule 9(b) issue in this case unless it first determined" the jurisdictional question. *Id.* at 9, 17.

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[1] Patient Protection And Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (Mar. 23, 2010).

The United States seriously underestimates the ongoing significance of the first question on "original source." Even after the PPACA, that question potentially affects hundreds of FCA cases—including cases pending when the PPACA was enacted and post-PPACA cases that implicate pre-PPACA conduct. The Court should review the "original source" question as potentially relevant to all of these cases—just as the Court has reviewed questions of similar ongoing significance in the past. *See, e.g.*, *United States v. Centennial Sav. Bank FSB*, 499 U.S. 573, 578 n.3 (1991) (granting certiorari on question about law as it existed before 1986 amendment "in light of the significant number of pending cases concerning the . . . [law] prior to 1986").

The ongoing significance of the "original source" question removes the only U.S. objection to reviewing the Rule 9(b) question. As shown below and contrary to what the United States suggests, because the jurisdictional issue here arises from the FCA statute and not Article III of the Constitution, the Court could also review the Rule 9(b) question even if it decided not to take the "original source" question. The Rule 9(b) question merits review now because, as the United States observes, it is "both unsettled and significant." U.S. *Amicus* Br. at 17. Moreover, notwithstanding the United States' suggestion, another case pending before the Court, *United States ex rel. Hopper v. Solvay Pharms., Inc.*, No. 09-1065 (filed Mar. 4, 2010) ("*Hopper* Pet."), does not present a superior vehicle for addressing the Rule 9(b) question. *See* U.S. *Amicus* Br. at 18 n.6.

I. The Court Should Review The First, "Original Source" Question Because It Is Of Continuing Significance To Hundreds of Pending And Future Cases.

Although the PPACA amended the "original source" provision, the "original source" question still has "continuing practical significance," as the United States acknowledges. U.S. *Amicus* Br. at 13. That is because the "original-source" provision at issue here still applies to hundreds of FCA cases—including (1) those pending when the PPACA was enacted, and (2) those filed post-PPACA that concern pre-PPACA conduct.

First, the "original source" question remains significant to hundreds of FCA cases pending when the PPACA was enacted. According to the Justice Department, 577 FCA cases were "active" as of September 30, 2009. *See* U.S. Dept. of Justice, Civil Div., *Fraud Statistics: Qui Tam Intervention Decisions & Case Status as of Sept. 30, 2009*, final page of *Fraud Statistics – Overview: Oct. 1, 1987 – Sept. 30, 2009, available at* http://www.justice.gov/civil/frauds/fcastats.pdf.[2] Clearly, hundreds of FCA cases were pending when the PPACA was enacted in March 2010. Because the PPACA does not apply retroactively, *see Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 130 S. Ct. 1396, 1400 n.1 (2010); U.S. *Amicus* Br. at 4, 13 & n.4, the Act's

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[2] This report is available through a link on the Justice Department's *False Claims Act Statistics* webpage, *available at* http://www.justice.gov/civil/frauds/fcastats.html.

amendment to the "original source" provision affects none of these cases, which remain subject to the "original source" provision at issue here.

Second, the "original source" question remains relevant also to cases filed *after* the PPACA's enactment. As this Court made clear in *Hughes Aircraft Co. v. United States ex rel. Schumer*, an amendment to the "original source" provision that Congress did not make expressly retroactive and that removes a defense—like the PPACA amendment—does not apply retroactively. 520 U.S. 939, 946-48 (1997). And a provision that is not retroactive does "not apply to the conduct . . . which occurred prior to [the amendment's] effective date." *Id.* at 946. Because the pre-PPACA "original source" provision will apply to future suits that challenge conduct occurring before the PPACA's enactment, the first question remains relevant to all of these suits as well.

The Court should thus review the first question presented because it is of continuing importance to hundreds of FCA cases. *See Centennial Sav. Bank FSB*, 499 U.S. at 578 n.3 (granting certiorari on question about law as it existed before 1986 amendment "in light of the significant number of pending cases concerning the . . . [law] prior to 1986").

II. The Court Should Review the Second, Rule 9(b) Question Because It Is Unsettled And Significant.

A. The Court Should Reach The Rule 9(b) Question After Deciding The "Original Source" Question.

The Court should also review the second, Rule 9(b) question. The United States agrees that the question implicates a "deep[]" circuit conflict on an "unsettled and significant" issue and thus "likely" warrants this Court's review in an "appropriate" case.[3] U.S. *Amicus* Br. at 9, 17. And the continuing significance of the "original source" question, as shown above, renders unpersuasive the United States' only objection to reviewing the Rule 9(b) question in this case. *Id.* at 9, 17-18.

Moreover, this Court often addresses threshold jurisdictional questions before reaching a question on the merits. Just last term, in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), this Court granted certiorari to

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[3] On the merits, the United States argues (U.S. *Amicus* Br. at 17) that a Rule 9(b) standard that would require the relator to identify false claims should be rejected because it would deter relators with helpful information about alleged fraud from filing suit. The United States' policy argument is untethered to either the text of Rule 9(b) or the purposes it is designed to serve. *See* Pet. for a Writ of Cert., *Ortho Biotech Prods., L.P. v. United States ex rel. Duxbury*, No. 09-654, at 31 (Dec. 3, 2009) ("OBP Pet."); Reply Brief for Petitioner, *Ortho Biotech Prods., L.P. v. United States ex rel. Duxbury*, No. 09-654, at 11-12 (Jan. 20, 2010) ("OBP Reply Br.").

address a federal pleading standard question in the face of an argument that the case was an unsuitable vehicle because a question existed about the Court's jurisdiction. The Court went on to decide the jurisdictional question, which enabled it to reach the pleading standard issue. *Id.* at 1945.

B. The Court Could Also Review The Rule 9(b) Question On Its Own.

Furthermore, contrary to the United States' contention (U.S. *Amicus* Br. at 9, 17-18), the Court need not decide the "original source" question in order to review the question on Rule 9(b). Although the "original source" question is jurisdictional, it concerns *statutory*, not Article III, jurisdiction. Courts may defer statutory jurisdiction questions to reach other questions—including merits questions—that enable them to dispose of the issue at hand. *See, e.g., Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 97 n.2 (1998) (acknowledging that courts can prioritize merits questions over statutory standing questions); *Conyers v. Rossides*, 558 F.3d 137, 150 (2d Cir. 2009) (declining to decide whether statute divests the court of jurisdiction and "proceed[ing] to address the alternative argument for dismissal" under Fed. R. Civ. P. 12(c) (judgment on the pleadings), where "the question is one of statutory rather than constitutional jurisdiction"); *Chalabi v. Hashemite Kingdom of Jordan*, 543 F.3d 725, 728 (D.C. Cir. 2008) ("*Steel Co.* requires that we prioritize the jurisdictional issue only when the existence of *Article III* jurisdiction is in doubt; that decision explicitly recognized the propriety of addressing the merits where doing so made it possible to avoid a doubtful issue of *statutory*

jurisdiction.") (internal quotation marks and citation omitted); *Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 132 n.10 (2d Cir. 2005) (declining to resolve question of statutory jurisdiction before disposing of *ex post facto* argument on the merits); *United States ex rel. Wood v. Applied Research Assocs., Inc.*, 328 Fed. Appx. 744, 746 (2d Cir. 2009) (unpublished) ("Because we agree that [the FCA relator's] claims fall short of the pleading standard required by Fed. R. Civ. P. 9(b), . . . we decline to reach the question of whether the district court had subject matter jurisdiction under 31 U.S.C. § 3730(e)(4)(A)."), *cert. denied*, 130 S. Ct. 1285 (2010).

Here, if this Court were to bypass the statutory jurisdiction question to reach the Rule 9(b) question, it would alter the posture of the case *only* if it ruled that dismissal for failure to satisfy 9(b) was warranted, but dismissal is precisely the result that would obtain from a finding of no jurisdiction. Bypassing the statutory jurisdiction question thus would not "take the [C]ourt into vast, uncharted realms of judicial opinion giving." *Steel Co.*, 523 U.S. at 97 n.2.

For all of these reasons, and contrary to the argument of the United States, this case is not a poor vehicle for resolving the Rule 9(b) question.

III. The *Hopper* Case Is Not A Better Vehicle For Resolving The Rule 9(b) Question.

The United States suggests that another case pending before the Court, *Hopper*, may be a better vehicle for addressing the Rule 9(b) question presented by Petitioner. *See* U.S. *Amicus* Br. at 18 n.6. Here too, the United States is mistaken.

First, the questions presented in the two petitions are not the same. This petition's Rule 9(b) question (and the court of appeals' decision) covers *both* core FCA liability provisions—31 U.S.C. §§ 3729(a)(1) and (a)(2).[4] The *Hopper* question expressly concerns only Section 3729(a)(2). *See Hopper* Pet. at i (question presented referencing only 31 U.S.C. § 3729(a)(2)).

Second, this petition's Rule 9(b) question concerns "[w]hether an FCA relator, alleging that the defendant induced a third party to submit false or fraudulent claims, can satisfy Rule 9(b) . . . without identifying a single false or fraudulent claim, but merely by alleging facts sufficient to strengthen the inference of fraud beyond possibility." OBP Pet. at i (internal quotation marks omitted). It thus concerns not only whether Rule 9(b) requires FCA relators to identify false or fraudulent claims but also, more basically, what Rule 9(b) *measures—i.e.*, whether it measures *plausibility* and perhaps requires only allegations that make fraud more than possible, or whether it measures *particularity* in a way that adds something to the Rule 8 plausibility standard. *See, e.g.*, OBP Pet. at 24-26, 32-33; OBP Reply Br. at 8 (Jan. 20, 2010).[5] By contrast, the *Hopper* question

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[4] These provisions were renumbered and amended by the Fraud Enforcement And Recovery Act Of 2009, Pub. L. No. 111-21, 123 Stat. 1617, 1621-23 (May, 20, 2009) ("FERA"). As previously noted, and as neither respondent nor the United States disputes, the changes do not affect the Rule 9(b) question presented. *See* OBP Pet. at 3 n.1; OBP Reply Br. at 9 n.2.

[5] The United States appears to agree with the First Circuit that the Rule 9(b) standard requires nothing more than Rule 8 in (continued...)

concerns only "[w]hether Rule 9(b) . . . requires the identification of a specific false claim." *Hopper* Pet. at i.

Third, the *Hopper* case is not a good vehicle to decide whether a relator needs to identify a specific false claim even under Section 3729(a)(2), because the Eleventh Circuit expressly stated that it was *unnecessary* to decide that question because the complaint failed to allege adequately the element of *intent*. *See Hopper v. Solvay Pharms., Inc.*, 588 F.3d 1318, 1330-31 (11th Cir. 2009); Br. in Opp'n to Pet. for Writ of Cert., *Hopper*, No. 09-1065, 2010 WL 1900659, at *7-8 (May 10, 2010) (arguing that the Eleventh Circuit's decision addressed only Rule 9(b)'s application to allegations of intent).

Finally, while the United States notes that *Hopper* "does not appear to contain any potential jurisdictional obstacle," U.S. *Amicus* Br. at 18 n.6, we have explained above why the statutory jurisdiction question should not be viewed as an "obstacle" to further review.

For all of these reasons, this petition is a better vehicle than *Hopper* for addressing Rule 9(b)'s application to the core liability provisions of the FCA.

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the FCA context. *See* U.S. *Amicus* Br. at 14-15 (stating that the First Circuit's holding that a relator can satisfy Rule 9(b) by providing "factual or statistical evidence to strengthen the inference of fraud beyond possibility" is "correct") (internal quotation marks and citations omitted).

IV. If The Court Does Not Review The Rule 9(b) Question, It Should Hold This Case Until It Disposes Of The Question In *Hopper*.

While this case is a better vehicle than *Hopper* to address the Rule 9(b) question presented here, the *Hopper* question—as to whether or not "Rule 9(b) . . . requires the identification of a specific false claim," *Hopper* Pet. at i—is undeniably relevant to the court of appeals' holding at issue here. Petitioner thus requests, if the Court decides to review the Rule 9(b) question presented in *Hopper* rather than in this case, that the Court defer its disposition of this petition until it resolves the related question presented in *Hopper*.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, if the *Hopper* petition is granted, this petition should be held and disposed of in accordance with the resolution in *Hopper*.

Respectfully submitted,

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